Supreme Court, U.S.
FILED

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In The

Supreme Court of The United States

JAY B. SILVERSTEIN,

Petitioner,

- against -

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Should vague statutes be the basis for the United States Office of Personnel Managements (OPM) interpretation of "wages", be considered reasonable in the determination of annuity limitations?

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OPINIONS BELOW

The June 13, 2005 opinion of the Administrative Judge (AJ) for the Merit Systems Protection Board (MSPB) is unreported (NY-831M-05-02-17-I-1). The September 22, 2005 opinion of the Board for the Merit System Protection Board is not published (NY-831M-05-02-17-I-1). The April 10, 2006 non-precedential opinion of the United States Court of Appeals for the Federal Circuit (06-3047) is reproduced in the appendix.

JURISDICTION

The decision of the United States Court of Appeals for the Federal Circuit was decided April 10, 2006. The petition for a writ of certiorari was filed on July 5, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1) (2).

CONSTITUTIONAL PROVISIONS

U.S. Constitution
Amendment XVI

STATUTES

5 U.S.C. § 8337
28 U.S.C. § 1254(1) (2)
26 U.S.C. § 1402(a)
5 C.F.R. § 831.1209(a)
5 C.F.R. § 831.1209(c)
5 C.F.R. § 831.1209(c)(1)
5 C.F.R. § 831.1209(c)(2)
5 C.F.R. § 831.1209(c)(3)
5 C.F.R. § 831.1209(g)
5 C.F.R. § 831.1209(g)(1)

UNITED STATES CONSTITUTION - AMENDMENT XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 8337

Disability retirement

(a) An employee who completes 5 years of civilian service and has become disabled shall be retired on the employee's own application or on application by the employee's agency. Any employee shall be considered to be disabled only if the employee is found by the Office of Personnel Management to be unable, because of disease or injury, to render useful and efficient service in the employee's position and is not qualified for reassignment, under procedures prescribed by the Office, to a vacant position which is in the agency at the same grade or level and in which the employee would be able to render useful and efficient service. For the purpose of the preceding sentence, an employee of the United States Postal Service shall be considered not qualified for a reassignment described in that sentence if the reassignment is to a position in a different craft or is inconsistent with the terms of a collective bargaining agreement covering the employee.

26 U.S.C. § 14[illegible]) - TAX ON SELF-EMPLOYMENT INCOME

1 Definition of net earnings from self-employment.
2 Computation of net earnings from self-employment.
3 Special rules for computing net earnings from self employment.
4 Rentals from real estate.
5 Dividends and interest.
6 Gain or loss from disposition of property.
7 Net operating loss deduction.

If your deductions are more than your income for the year, you may have a "net operating loss." You can use a net operating loss to lower your taxes in other years".

8 Community income.
9 Puerto Rico.
10 Personal exemption deduction.
11 Ministers and members of religious orders.
12 Possession of the United States.
13 Income from agricultural activity.
14 Options available to farmers in computing net earnings from self-employment for taxable years ending after 1954 and before December 31, 1956.
15 Options available to farmers in computing net earnings from self-employment for taxable years ending on or after December 31, 1956.
16 Exercise of option.
17 Retirement payments to retired partners.
18 Split-dollar life insurance arrangements.

28 U.S.C. § 1254(1) (2) – COURTS OF APPEALS; CERTIORARI; CERTIFIED QUESTIONS

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

5 C.F.R. § 831.1209(a)

(a) Restoration to earning capacity. If a disability annuitant is under age 60 on December 31 of any calendar year and his or her income from wages or self-employment or both during that calendar year equal at
least 80 percent of the current rate of basic pay of the position occupied immediately before retirement, the annuitant's earning capacity is considered to be restored. The disability annuity will terminate on the June 30 after the end of the calendar year in which earning capacity
is restored. When an agency reemploys a restored disability annuitant at any grade or rate of pay within the 180-day waiting period pending termination of the disability retirement benefit, OPM will terminate the
annuity effective on the date of reemployment.

5 C.F.R. § 831.1209(c)

(c) Income. Earning capacity for the purposes of this section is demonstrated by an annuitant's ability to earn

post-retirement income in a calendar year through personal work efforts or services. The total amount of
income from all sources is used to determine earning capacity.

This includes income received as gross wages from one or more employers, net earnings from one or more self-employment endeavors, and deferred income that is earned in a calendar year. In determining an annuitant's income for a calendar year, the following considerations apply:

5 C.F.R. § 831.1209(c) (1)

(1) There are two sources of income: wages and self-employment income. All income which is subject to Federal employment taxes (i.e., social security or Medicare taxes) or self-employment taxes constitutes earned income. In addition, any other income as described in this section also constitutes earned income. The determination of whether a disability annuitant earns wages as an employee of an organization or earns income as a self-employed person is based on the usual common law rules applicable in determining the existence of an employer-employee relationship. Whether the relationship exists under the usual common law rules will be determined by OPM after the examination of the particular facts of each case.

5 C.F.R. § 831.1209(c) (2)

(2) Income earned from one source is not offset by losses from another source. Income earned as wages is not reduced by a net loss from self-employment. The net income from each self-employment endeavor is calculated separately, and the income earned as net earnings from one self-employment endeavor is not reduced by a net loss from another selfemployment endeavor. The net incomes from each

separate self-employment endeavor are added together to determine the total amount of income from self-employment for a calendar year.

5 C.F.R. § 831.1209(c)(3)

(3) Only income earned from personal work efforts or services is considered in determining earning capacity. All forms of non-work-related unearned income are excluded. Paragraph (f) of this section includes a representative list of the types of unearned income that are not considered.

5 C.F.R. § 831.1209(g)

(g) Job-connected expenses incurred because of the disabling condition may be deducted from income.

5 C.F.R. § 831.1209(g)(1)

(1) Job-connected expenses deductible from income for purposes of determining earning capacity are those expenses that are primarily for and essential to the annuitant's occupation or business and are directly connected with or result from the disability for which the disability annuity was allowed.

5 U.S.C. § 8337

Disability retirement

(a) An employee who completes 5 years of civilian service and has become disabled shall be retired on the employee's own application or on application by the employee's agency. Any employee shall be considered to be disabled only if the employee is found by the Office of Personnel Management

to be unable, because of disease or injury, to render useful and efficient service in the employee's position and is not qualified for reassignment, under procedures prescribed by the Office, to a vacant position which is in the agency at the same grade or level and in which the employee would be able to render useful and efficient service. For the purpose of the preceding sentence, an employee of the United States Postal Service shall be considered not qualified for a reassignment described in that sentence if the reassignment is to a position in a different craft or is inconsistent with the terms of a collective bargaining agreement covering the employee.

STATEMENT OF THE CASE

Petitioner Jay B. Silverstein appealed to the Merit Systems Protection Board, arguing that although he reported W-2 wage earnings of $41,948.00 from a business he owned, he also reported losses of $34,868.16 from various other self-employment owned endeavors in 1999. Silverstein asserts that his business losses, that occurred only because he was mandated to stop working for the United States Postal Service because of on-the-job disabilities, should have been subtracted from his W-2 wage income, resulting in a total income of approximately $7,080.00.

SUMMARY OF ARGUMENT

Silverstein was requested by the United States Postal Service to tender his disability retirement papers. The disability retirement was further approved by the Office of Personnel Management (OPM). OPM has contradictory statutes for the basis of determining earned income and income for purposes of the statutory 80 percent limitation 5 C.F.R. § 831.1209. Moreover, the United States Court of Appeals for the Federal

Circuit (06-3047) has concluded that OPM's interpretation of wages is ambiguous.

ARGUMENT

On October 20, 1979, Jay B. Silverstein was requested by the United States Postal Service and subsequently, retired on disability, from the position of Distribution Clerk, PS-5, step 9, with the United States Postal Service.

Statute 5 U.S.C. § 8337 states, "...any employee shall be considered to be disabled only if the employee is found by the Office of Personnel Management to be unable, because of disease or injury, to render useful and efficient service in the employee's position and is not qualified for reassignment, under procedures prescribed by the Office, to a vacant position which is in the agency at the same grade or level and in which the employee would be able to render useful and efficient service. For the purpose of the preceding sentence, an employee of the United States Postal Service shall be considered not qualified for a reassignment described in that sentence if the reassignment is to a position in a different craft or is inconsistent with the terms of a collective bargaining agreement covering the employee..." Therefore, Silverstein was compelled to seek employment elsewhere. Since physical limitations restricted his employment possibilities, Silverstein, after trying various careers, decided self-employment was the best course of action.

Risking his personal assets, Silverstein started to open various business enterprises. One of these businesses was profitable and others incurred losses. At times, although there was total profit, the net income was still below OPM's limitations. "Income. Earning capacity for the purposes of

this section is demonstrated by the annuitant's ability to earn post-retirement income in a calendar year through personal. work or service. The total amount of income from all sources is used to determine earning capacity. This includes income received as gross wages from one or more employers, net earnings from one or more self-employment endeavors, and deferred income that is earned in a calendar year..."5C.F.R.§ 831.1209(c). This Statute clearly states that Silverstein is entitled to add W-2 wages and self-employment earnings, even though the self-employment earnings amounted to a loss.

OPM argues that Silverstein's self-employment losses do not constitute earnings because they are not taxable. OPM contradicts itself. "There are two sources of income: wages and self-employment income. All income which is subject to Federal employment taxes (i.e., social security or Medicare taxes) or self-employment taxes constitutes earned income. In addition, any other income as described in this section also constitutes earned income. The determination of whether a disability annuitant earns wages as an employee of an organization or earns income as a self-employed person is based on the usual common law rules applicable in determining the existence of an employer-employee relationship. Whether the relationship exists under the usual common law rules will be determined by OPM after the examination of the particular facts of each case" 5 C.F.R. § 831.1209(c) (1). OPM in essence gives the United States Internal Revenue Service (IRS) the determining factor to realize whether a self-employment loss is a viable taxable deduction. Likewise, the United States Congress assigned the same factor to the IRS in the 14th Amendment to the Constitution. "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration". In 1862, President

Lincoln signed into law a revenue-raising measure to help pay for Civil War expenses. The measure created a Commissioner of Internal Revenue and the nation's first income tax. Furthermore, 26 U.S.C. § 1402(a) (7) - Tax on Self-Employment Income, Net Operating Loss Deduction, states, "Net operating loss. If your deductions are more than your income for the year, you may have a "net operating loss." You can use a net operating loss to lower your taxes in other years". The IRS additionally recognizes the need for a taxpayer to show loss income on Form 1040, Schedule C, "Profit or Loss From Business" that can be utilized to offset self-employment and W-2 wage earnings. OPM demonstrates that their statute can not be decisive because it states that "whether the relationship exists under the usual common law rules will be determined by OPM after the examination of the particular facts of each case", since there can be many interpretations, it becomes unreasonable and unenforceable.

Silverstein also argues that OPM statutes are not enforceable or reasonable because of there contradictory nature as set force in "Income earned from one source is not offset by losses from another source. Income earned as wages is not reduced by a net loss from self-employment. The net income from each self-employment endeavor is calculated separately, and the income earned as net earnings from one self-employment endeavor is not reduced by a net loss from another self-employment endeavor. The net incomes from each separate self-employment endeavor are added together to determine the total amount of income from self-employment for a calendar year" 5 C.F.R. § 831.1209(c) (2). Silverstein contends that if separate earnings from each self-employment endeavor were totaled and there is a loss that loss should also be deductible from W-2 wages, as set forth in "Only income earned from personal work efforts or services is considered in determining earning capacity. All

forms of non-work-related unearned income are excluded. Paragraph (f) of this section includes a representative list of the types of unearned income that are not considered" 5 C.F.R. § 831.1209(c) (3).

OPM states, "Restoration to earning capacity. If a disability annuitant is under age 60 on December 31 of any calendar year and his or her income from wages or self-employment or both during that calendar year equal at least 80 percent of the current rate of basic pay of the position occupied immediately before retirement, the annuitant's earning capacity is considered to be restored. The disability annuity will terminate on the June 30 after the end of the calendar year in which earning capacity is restored. When an agency reemploys a restored disability annuitant at any grade or rate of pay within the 180-day waiting period pending termination of the disability retirement benefit, OPM will terminate the annuity effective on the date of reemployment" 5 C.F.R. § 831.1209 (a). However, OPM fails to have enforceable and reasonable statutes that are decisive for a significant method of determining the 80 percent limitation guideline.

In addition, Silverstein, argues that since he is a disability retiree from the United States Post Office, approved by OPM, he is further entitled to deduct all business related expenses under 5 C.F.R. § 831.1209(g) "Job-connected expenses incurred because of the disabling condition may be deducted from income" and 5 C.F.R. § 831.1209(g)(1) "Job-connected expenses deductible from income for purposes of determining earning capacity are those expenses that are primarily for and essential to the annuitant's occupation or business and are directly connected with or result from the disability for which the disability annuity was allowed". Since Silverstein's business endeavors started because he was no longer capable to perform is Postal Service

responsibilities, all of his business endeavors are job-connected and are directly connected with or result from the disability incurred from the United States Postal Service, therefore, job-connected expenses as claimed on Silverstein's 1999 federal income tax return may be deducted from income.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the United States Court of Appeals for the Federal Circuit and the case be awarded in Jay B. Silverstein's favor.

Respectfully Submitted,

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK FIELD OFFICE

JAY B. SILVERSTEIN.
Appellant,

DOCKET NUMBER
NY-831M-05-0217-I-1

v.

OFFICE OF PERSONNEL MANAGEMENT,

DATE:June13,2005

Agency.

(CSA 2 248 859)

Jay B. Silverstem, Stormville, New York, pro se.

James Williams. Washington, D.C.. for the agency.

BEFORE
Arthur S. Joseph Chief
Administrative Judge

INITIAL DECISION

INTRODUCTION

On April 14, 2005, the appellant filed an appeal challenging a February 17, 2005 Office of Personnel Management (OPM) reconsideration decision that found that he has been restored to earning capacity in calendar year 1999 and that his disability retirement annuity under the

Civil Service Retirement System should have been terminated effective June 30, 2000.' OPM further found that

Although the appeal was untimely filed. 1 found during a recorded telephonic prehearing conference on May 23, 2005, that the appellant had established good cause for the delay in filing. See Initial Appeal File. Tab 13, Conference Tape, Side 1.

He was overpaid $18,112.00 in disability retirement benefits from July 1 through November 30, 2001. It proposed to collect the overpayment in 72 monthly installments at $250.00 and one installment at $112.00. The hearing that the appellant requested was held telephonically on June 1, 2005, during which only oral argument was provided. For the reasons below, OPM's reconsideration decision is AFFIRMED.

ANALYSIS AND FINDINGS

Background

The following essential facts are not in dispute. On October 20, 1979, the appellant retired on disability, from the position of Distribution Clerk, PS-5, step step 9, with the United States Postal Service and continued to receive his annuity until November 30, 2001. See IAF, Tabs 1, 9, and 15. Under 5 U.S.C. § 8337(d). if an annuitant receiving disability retirement before becoming age 60 is restored to earning capacity fairly comparable to the rate of pay of the position lasi occupied at the time of retirement, payment of the annuity terminates 180 days after the calendar year in which earning capacity is restored. That statute further provides that earning capacity is deemed restored if in any calendar year the income of the annuitant from wages or self-employment or both equals at least 80 percent of the

current rate of pay of the position occupied immediately before retirement.

As of December 31, 1999, the base salary for the position that the appellant held when he retired was $38,614.00; thus, the 80 percent earnings limitation under 5 U.S.C.§ 8337(d) was $30,891.00. For calendar year 1999, the appellant, who was then under 60 years old. submitted his federal income tax forms, including a Form W-2 Wage and Tax Statement reporting earnings of $41,948.00 from wages from which social security and Medicare taxes were deducted, from his employment with Envirozyme International, Inc. See Initial Appeal File, Tabs 1,7,9, 12, 13. and 15.

On August 10, 2004, OPM issued an initial decision in which it found that appellant was restored to earning capacity, effective July 1, 2000, and that his annuity was terminated as of December 1, 2001, resulting on an overpayment of $18,112.00 in disability retirement benefits. See 1 AF, Tab 9, Subtab 2c. The appellant sought reconsideration of that decision. See id., Subtab 2B. In its reconsideration decision, OPM affirmed its initial decision. See id., Subtab 2a. This appeal followed. See id., Tab 1.

QPM established that the appellant was restored to earning capacity.

On appeal, the appellant pointed out that under OPM's implementing regulations atv^C.F.R. § 831.1209(c), income for purposes of the statutory 80 percent limitation includes gross wages from one or more employers, net earnings from one or more self-employment endeavors, and deferred income that is earned in a calendar year. The regulations further provide that there are two sources of incomes, specifically wages and self-employment income. All income which is subject to Federal employment taxes, i.e., social security and Medicare taxes constitutes earned income. See 5 C.F.R. § 831.1209(c)(1). For determining annual income from wages or self-employment or both,

income is earned in the calendar year the annuitant actually or constructively receives the remuneration. See C.F.R. § 831.1209(c)(5).

The appellant argued that he had not been restored to earning capacity for calendar year 1999 because his total earnings from wages and self-employment, which are considered under 5 C.F.R. § 831.1209(c). were below the 80 percent statutory limitation. In that regard, he asserted that although his earnings that were subject to social security and Medicare taxes were $41,948.00, he owns other businesses and reported that his loses from self employment were $34,868.00. See IAF, Tab 1, 7. 12, 15, and 16. His supporting evidence included a Form 1040 Schedule C entitled, Profit or Loss From Business (Sole Proprietorship), showing that he reported a loss of $34,868.16 for expenses included from "business start-ups." See id., Tab 12. He therefore argued that after subtracting his self employment losses from his wages, his income was only $7,080.00, which is well below the $30,891.00 limitation. See id., Tabs 15 and 16.

In Balick v. Office of Personnel Management, 85 F.3d 586 (Fed. Cir. 1996), the Court of Appeals for the Federal Circuit case resolved the issue of whether OPM may distinguish between income from wages and income from self-employment, and may treat them differently from the Internal Revenue Service in terms of allowable deductions for restoration to earning capacity purposes. There, the annuitant had both wages and self-employment income, the latter of which business expenses offset. Although the annuitant argued that the income he should be required to report to OPM for earning capacity purposes was the "taxable income" figure used in determining his federal income tax, i.e., the income after certain business expense deductions (the figures the appellant wished to use in this case), the court noted that an agency's interpretation of a statute it is charged with interpreting is entitled to substantial

deference, and that it would sustain such agency interpretation "if it is reasonable and not at variance with the plain meaning of the statute." Id. at 588. The court found that since there was no explicit statutory definition of "income ... from wages or self-employment" in section 8337, OPM's interpretation of "wage" income to include all earnings subject to federal employment taxes such as social security and Medicare was reasonable in view of the language and purpose of the statute. See id. at 589.

Applying Balick in Ruskin v. Office of Personnel Management, 73 M.S.P.R. 546 (1997) in construing 5 C.F.R. § 831.1209(c), the Board held income subject to social security and Medicare taxes is wage income. There, the Board found that the record showed that an annuitant's wages for calendar W-2 "Wage and Tax Statement" for calendar year 1992 had deductions for both social security and Medicare taxes. As such, the Board did not reach the issue of whether the annuitant was self-employed because it was clear that his income for earning capacity purposes was income from "wages" and not from "self-employment" under section 831.1209(c). The fact that the annuitant had business expenses in connection with his employment as a commission-only salesman did not change this result. Further, OPM's regulations do not provide for deductions from wage income for business expenses, although certain business expenses may be deducted from self-employment income under 5 C.F.R. § 831.1209(c)(4). See Ruskin, 73 M.S.P.R. at 550-51

Based on all the foregoing, I find that the appellant's earned income of $41,948.00 from which social security and Medicare wage taxes was deducted exceeded the 80 percent statutory limitation. See Ruskin, 73 M.S.P.R. at 549-51. Granted, he also reported losses from business start-up expenses on Schedule C of his Form 1040. However, the governing statutory provision, 5 U.S.C. § 8337(d) clearly states that an annuitant is returned to earning if his income

from wages or self-employment or both exceed the 80 percent statutory limitation. Contrary to the appellant's argument, OPM's implementing regulations at 5 C.F.R. §831.1209(c) do not provide that the appellant's business start-up expenses must be offset from his wages, thereby resulting in an amount below the limitation. See Balick, 85 F.3d at 589. Accordingly, I find that the appellant was restored to earning capacity for calendar 1999 and that disability retirement should have been terminated, effective June 30, 2000.

OPM established that the appellant was overpaid $18,112.00.

OPM bears the burden of proving by preponderant evidence that an overpayment occurred. See 5 C.F.R. § 831.1407.2 To satisfy its evidentiary burden, OPM submitted computer payment history records showing that the appellant

"Preponderant evidence is defined as the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find th^t a contested fact is more likely to be true than untrue. See 5 C.F.R. § 1201.56(c)(2).

received an overpayment of $18,112.00 from July 1, 2000 though November 30, 2001. See IAF, Tab 17. The appellant did not present any argument or evidence challenging the computation of the overpayment. See id., Tabs 1, 12, 13, 15, and 16. Therefore, I find that the agency has satisfied its burden that an overpayment exists in the amount of $18,112.00.

The appellant did not request a waiver or a change of the repayment schedule.

Under 5 U.S.C. § 8346(b), recovery of an annuity overpayment must be waived when the annuitant "is without fault and recovery would be against equity and good conscience." See Mitchell v. Office of Personnel Management, 97 M.S.P.R. 566, 570 (2004); see also Balick, 85 F.3d at 589 n.*. The annuitant bears the burden of establishing his entitlement to a waiver by substantial

evidence.3 5 C.F.R. § 831.1407(b); see also Mitchell, 91 M.S.P.R. at 570-71. An annuitant, who is ineligible for waiver, regardless of the reason, is entitled to an adjustment in the recovery schedule if he shows that recovery would cause financial hardship at the rate scheduled. See Dorrello v. Office of Personnel Management, 91 M.S.P.R. 535, 537 (2002); Maxwell, 78 M.S.P.R. at 360. Here, the appellant argued only that the overpayment did not exist. He did not request a waiver of the overpayment or an adjustment of the repayment schedule either before OPM issued its reconsideration decision or on appeal to the Board. See IAF, Tabs 1, 9, 12, 15, and 16. Therefore, I have not considered whether a waiver or an adjustment is warranted.

DECISION

The agency's reconsideration decision is AFFIRMED.

Substantial evidence is defined as the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable people might disagree. 5 C.F.R. § 1201.56(c)(1). It is a lower standard than preponderant evidence. 5 C.F.R. § 1201.56(c)(2).

APPENDIX

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

06-3047

JAY B. SILVERSTEIN,
Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

DECIDED: April 10, 2006

Before LINN, DYK, and PROST, Circuit Judges.
PER CURIAM.

Jay B. Silverstein seeks review of the decision of the Merit Systems Protection Board ("Board"), upholding the Office of Personnel Management's ("OPM") determination that Silverstein's disability retirement annuity should have been terminated on June 30,

2000, and that Silverstein owed OPM $18,112.00 in overpayments. We affirm.

BACKGROUND

Disability retirement is available to certain civilian service employees. 5 U.S.C. § 8337 (2000). However, under 5 U.S.C. § 8337(d), if an annuitant receiving disability retirement is restored to "earning capacity" before the age of 60, then the annuity payment terminates 180 days after the end of the calendar year in which earning capacity was restored. "Earning capacity is deemed restored if in any calendar year the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement." Id.

On October 20, 1979, Silverstein retired from his position of Distribution Clerk with the United States Postal Service and received a disability retirement annuity until November 30, 2001. On August 10, 2004, OPM determined that Silverstein had been restored to earning capacity in 1999, because Silverstein reported wage earnings of $41,948.00 on his 1999 federal income tax forms. The rate of pay for a Distribution Clerk in 1999 was $38,614.00. Thus, Silverstein's wage income in 1999 exceeded "80 percent of the [ ] rate of pay of the position [he] occupied immediately before retirement." 5 U.S.C. § 8337(d). OPM determined that Silverstein had been ineligible to receive the annuity from July 1, 2000 through November 30, 2001 and that he was overpaid $18,112.00 annuity benefits during that time.

Silverstein appealed to the Board, arguing that although he reported wage earnings of $41,948.00, he also reported loses of $34,868.16 from self employment expenses in 1999. Thus, Silverstein asserted that his business losses should have been subtracted from his wage income, resulting in a total income of approximately $7,080.00.

In an initial decision, the Administrative Judge ("AJ") affirmed the OPM. The full Board denied review. This petition for review followed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

DISCUSSION

Our review of disability determinations under the Civil Service Retirement System is limited to determining whether "there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative process." Lindahl v. Office of Pers. Mgmt., 470 U.S. 768, 791 (1985) (internal quotation marks omitted).

I

Silverstein argues that OPM should have subtracted his self employment expenses from his wage earnings when determining his "earning capacity." However, OPM's regulations clearly state that for the purposes of determining "earning capacity," "[i]ncome earned as wages is not reduced by a net loss from self-employment." 5 C.F.R. § 831.1209(c)(2) (2004).

We approved OPM's approach in Balick v. Office of Personnel Management, 85 F.3d 586 (Fed. Cir. 1996). In Balick, the petitioner received both wages

and commissions while receiving a disability annuity. Id. at 587. OPM determined the petitioner's "earning capacity" under 5 U.S.C. § 8337 by including the entire amount of his wages without deducting business expenses incurred in generating commissions related to petitioner's business. Id. at 588. On appeal, this court found that "[t]here is no explicit statutory definition of 'income . . . from wages or self-employment' in section 8337." Id. at 589 (ellipses in original). Given the ambiguity, we concluded that OPM's interpretation of what "wages" included under 5 U.S.C. § 8337 was reasonable and entitled to deference.

Silverstein attempts to distinguish Balick by arguing that Balick was based on Internal Revenue Code provisions pertaining to business expenses as opposed to business losses. On the contrary, in Balick we held that OPM was not required to rely on the "taxable income" figure used for federal income tax purposes when determining "earning capacity." 85 F.3d at 588-89. Balick explicitly permits OPM to treat income from wages as separate and distinct from income from self employment. Losses from the latter cannot offset income from the former. We see no meaningful distinction between Balick and this case and therefore affirm the Board's decision in this respect.

II

On appeal, Silverstein also argues that the AJ improperly permitted OPM to submit an exhibit after the telephonic hearing, thereby denying Silverstein his right to cross-examine OPM on the contents of this exhibit.

Prior to the hearing, OPM submitted a letter to the AJ indicating that it had incorrectly calculated

Silverstein's annuity overpayment as $18,112.00, when it should have been $18,102.00. After the hearing and at the AJ's request, OPM made a second submission, indicating that its initial calculation of $18,112.00 had been correct all along. While it is true that this second submission occurred after the telephonic hearing, Silverstein was copied on the submission, and Silverstein has failed to establish that any error in considering it was harmful. See Guise v. Dep't of Justice, 330 F.3d 1376, 1381-82 (Fed. Cir. 2003). Silverstein does not, for example, contend that OPM's recalculation was incorrect. Therefore, we find no reason to disturb the Board's decision.

For the foregoing reasons, the Board's decision is affirmed.

No costs.